United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1731

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA, :

Appellee, :

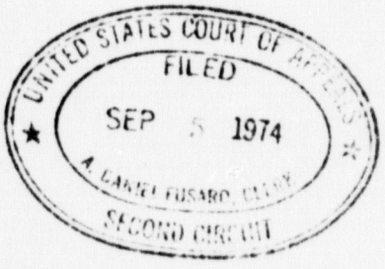
-against- : Docket No. 74-1731

PETER OTTLEY, :

Defendant-Appellant. :

- x

DEFENDANT-APPELLANT'S REPLY BRIEF



Respectfully submitted,

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INDEX

Table of Authorities

Cases

Other Authorities

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
Appellee,	:	
-against-	:	Docket No. 74-1731
PETER OTTLEY,	:	
Defendant-Appellant.	:	

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Preliminary Statement

The principal briefs of the parties draw the issues sharply and clearly. The basic contentions in the Government's brief are answered in our own opening brief; and extensive reply is unnecessary. We shall therefore seek to confine this brief to those arguments not heretofore dealt with.

I. The Evidence Was Insufficient Under All Three Counts (Answering Appellee's Point I).

A. The Auto Expenditure Counts

The Government seeks to defend the sufficiency of its case by citing "evidence" which was never adduced and concocting inferences which cannot permissibly be drawn.

On the key issue of whether Ottley was aware that Mrs. Byrne did not drive her husband on union assignments, or was unavailable to do so, the Government brief asserts (p. 11):

> "Having known Byrne since 1937, he was well aware that Mrs. Byrne was otherwise employed and not available to chauffeur Mr. Byrne around."

This is sheer non sequitor, a speculative conjecture which the Government would substitute for evidence and legitimate inference.

There is not the slightest evidence that Ottley knew Mrs. Byrne was employed, although Byrne, who twice took the stand as a Government witness, could readily have been questioned on this point. There is no evidence that the two families socialized at all and no evidence that Ottley's union acquaintanceship with Byrne extended to an exchange of personal or family information.

Moreover, although Ottley did know Byrne since 1937, the evidence shows that Peter Byrne and Virginia Byrne were not even married in 1937, or 1947, or even 1957. Byrne testified he got married in 1959 (382a). There is no evidence, however, as to when Ottley learned of this marriage. During the limited period of the auto leasing, Ottley was aware of the existence of a Mrs. Virginia Byrne from the gasoline credit card receipts, but inasmuch as those were issued by a gasoline station near the Byrnes' New Jersey home, they would give him no inkling as to her job in New York.

Finally, there is no evidence that Mrs. Byrne was employed for any particular period of time, either before or after her marriage to Byrne. The only evidence as to her employment covers the limited, relatively recent period during which the auto was leased for Byrne's use.

Ottley's familiarity with the Byrne family relationships and occupations could have been explored at trial, but it was not. The Government cannot now rely on speculative assumptions which are totally unwarranted by the evidence which was adduced. That

evidence simply does not establish the requisite knowledge on Ottley's part.

B. The Record Keeping Count

Equally misleading is the Government's summary of the evidence of knowledge and willfulness under the record-keeping count (Gov't Br., p. 3).

Ottley did not testify that he knew anything as to the nature and extent of the records required to be kept under the LMRDA; indeed, he did testify that he believed the petty cash vouchers which he submitted were sufficient (354a-356a).

Nor is there anything in the evidence to indicate that "Ottley's unquestioned expertise" in union affairs had anything to do with record-keeping or internal office procedures, particularly under the LMRDA. His role was that of chief executive, and in a labor organization that means such activities as organizing, negotiating collective agreements, processing grievances, and administering contracts. This "expertise" does not include the kinds of information to be set forth in a petty cash voucher.

Finally, the Government brief cites the meetings held by the International, the literature distributed by the International, and the lectures by union attorneys. But no attempt is made to point to any documentary commentary dealing with this part of the statute or any evidence that the attorneys' lectures covered this subject. As our principal brief demonstrates, the literature in evidence (except for the statute itself which was not sent to individual local union officers) does not deal with the record-keeping requirement at all; and although one of the

union attorneys testified at trial, he could not recall whether the lawyers' lectures ever touched on this matter. The Government brief simply ignores this point. Its reliance on this evidence, however, reinforces our own contention as to the prejudicial effect of its erroneous admission.

II. The Trial Court's Charge on the Automobile Expenditure Was Prejudicially Erroneous (Answering Appellee's Point II).

In seeking to defend the charge to the jury, the Government brief relies essentially on the Eighth Circuit's decision in United States v. Goad, 490 F.2d 1158 (8th Cir. 1974). Judge Frankel's charge did not follow the Goad opinion, however, and that opinion does not support his charge.[1] Moreover, we respectfully submit that the Goad opinion itself misconstrues Section 501(c) and does not accord with the decisions of this Circuit.

Nothing in Goad supports Judge Frankel's distinction between "pure union benefit" and "mixed benefit" expenditures. Nor is that distinction drawn in any other case under Section 501(c) of the LMRDA or, as far as our research has disclosed, any embezzlement case under any similar federal statute. The purported distinction, moreover, cannot be justified as legally significant under either the language or objectives of the federal larceny-type statutes, including Section 501(c). If a

1. In discussing with counsel his prospective charge on this aspect of the case, Judge Frankel noted the Goad opinion, characterized it as unpersuasive, and indicated he was not relying on it (391a-392a).

good faith belief that an expenditure serves a union purpose and is being made for that reason constitutes a defense to an embezzlement charge where the knowingly unauthorized expenditure has no element of personal benefit, then the same good faith belief should also constitute a defense where the expenditure has elements of personal benefit as well. In each case, the defendant lacks the necessary criminal intent, the intent to injure and deprive the owner of the use and benefit of his property.[2]

The Goad Court, unlike Judge Frankel, apparently regarded both actual union benefit and good faith belief in union benefit as totally irrelevant to a Section 501(c) charge, irrespective of the nature of the expenditure. Under the Goad opinion, the key elements to the crime were "fraudulent intent" and "a demonstrated lack of authorization." 490 F.2d 1158 at 1166. "Fraudulent intent" would presumably suffice to exclude good faith belief in union benefit. And the Government brief (p. 19) concedes that "an intent to injure or defraud also is an essential element of the offense prohibited by Section 501(c)."

The charge to the jury herein, however, said not a word about "fraudulent intent" or "intent to injure or defraud." The jury was never told that this was an element of the crime, nor was it instructed as to what would constitute fraudulent intent

2. Although Judge Frankel discussed the "mixed benefit"-"pure union benefit" dichotomy in his charge, he apparently viewed the distinction as a question of law rather than fact. For he did not instruct the jury to determine whether the expenditure under any of the Section 501(c) counts was mixed or pure union, nor did he advise as to how such a determination should be made or under what standards. Finally, he never instructed as to the rule to be followed should the jury regard a particular expenditure as pure union rather than mixed. Even under his own theory of Section 501(c), this constitutes error.

or how the concept should be applied to the evidence in this case. If Goad were to be followed, as the Government brief seems to urge, then the conviction under the two automobile counts must be reversed for failure to charge the jury on one of the two elements deemed crucial by the Eighth Circuit.

But Goad, as interpreted by the Government, equally misconstrues Section 501(c).[3] Under the Government's reading of that opinion, the Eighth Circuit's reference to "fraudulent intent," although semantically more pejorative, is substantively a mere repetition of "knowingly unauthorized expenditure." At p. 15, the Government brief asserts that proof of fraudulent intent is established by evidence that defendant "knowingly" expended union funds "not authorized according to the union's constitution and bylaws." The same assertion is repeated at p. 19. Such an argument reduces the concept of fraudulent intent to a meaningless cipher.

Certainly this is not what the courts have meant when they have referred to the requirement of an intent to injure or defraud in construing the several similarly worded larceny-type federal statutes (see our principal brief, pp. 26-32). The courts have consistently reiterated that a defendant, to be guilty, must have intended to deprive the owner of the use and

3. Notwithstanding broad dicta in Goad, which we deem erroneous, the decision can be read as rejecting the relevancy of the "union benefit" defense only as applied to unauthorized increases in the salaries of union officers, and not in all fact situations. Thus at p. 1165 the Court said that it would not accept the defense "as an essential element in this case involving the unauthorized increased salaries of union officers." And at p. 1163 the Court spoke of the immateriality under these facts of "incidental benefits that may fortuitously inure to the benefit of the victim." It may well be that the facts in Goad did not justify a "union benefit" charge and, thus narrowly viewed, the Goad decision may not be wrong

benefit of his property and to convert that property to the use of defendant or his confederate. This concept of a meaningful, not an illusory, intent to injure or defraud goes well beyond a mere failure to follow prescribed procedures. And it is the principles expressed in these cases that the majority of this Court properly regarded as determinative, in United States v. Silverman, 430 F.2d 106 (2d Cir. 1970), cert. den'd, 402 U.S. 953.

The Government brief (pp. 16, 18) repeatedly quotes Judge Moore's dissent in Silverman as rejecting the materiality of an "incidental," or "fortuitous" or "collateral" union benefit.[4] These references are wholly inapposite. Byrne's auto was but one of more than a dozen leased for the use of union representatives, and Ottley denied knowing of Byrne's inability to drive. The evidence thus permitted a jury finding that Ottley authorized the lease of a car for Byrne with exactly the same understanding as he authorized the leases of all the other automobiles for other officials: in the good faith belief that it would be used to transport the official on union business and in the union's interest. There is nothing "incidental," "fortuitous" or "collateral" about this. And Ottley was entitled to a charge properly instructing the jury that if they made such a finding, they should acquit.

The Goad opinion, 490 F.2d at 1166, quoted at p. 16

4. As indicated in footnote 3, supra, similar statements appear in Goad.

of the Government brief, asserts that a union official must "know the proper procedures for conducting his union's business" and "commits embezzlement" as a matter of law, when he fails to follow these procedures and thus violates "the fiduciary responsibility." We believe this formulation, on which the Government so heavily relies, to be fundamentally erroneous. It totally confuses the civil standard of violation of Section 501(a) with the criminal standards of larceny-type crimes under Section 501(c). It overlooks the fact that Section 501(c) is not cast in terms of a willful or knowing violation of Section 501(a) (see our principal brief, p. 32).[5] And it ignores entirely the admonition in Silverman, that Section 501(c) subjects union officials to the "same test of criminal liability" as persons covered by cognate federal statutes, "not to a lower one."

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5. The legislative history of Title V of the Landrum-Griffin Act is set forth and indexed in a one-volume compilation entitled Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, published by the Department of Labor (not to be confused with the similarly-captioned two-volume work published by the NLRB). As would be expected from the terms of Section 501, the legislative history indicates that Section 501(a) was intended to make applicable to labor organizations and their officials the general body of civil standards developed under state law for fiduciaries and trustees (e.g. pp. 1026-1027, 1051); while Section 501(c) was designed to create a federal crime of embezzlement of union funds embodying the same criminal standards generally applicable to the familiar crime of embezzlement (e.g. pp. 1042, 1079). It requires no extensive review of the law to demonstrate that the two are quite different.

The Government's contention that acceptance of our position would create "an almost insurmountable obstacle to conviction" under Section 501(c) does not merit extended discussion. There has been no difficulty in obtaining convictions under the cognate federal larceny-type statutes which have been on the books for a century or more. There has been no difficulty in obtaining convictions under Section 501(c) itself, although the Government admits that Goad, decided in 1974, is the first case to enunciate its view of the Section.

The simple fact is that the "union benefit" defense does not often arise, and the evidence in most cases will not require a charge on this issue at all. This very case presents ample demonstration of that proposition. For example, the several counts relating to the contributions made by the union for Ottley's retirement pension did not raise any issue of union benefit and required no charge on this subject. Nor did the counts relating to admittedly personal expenditures in which the sole defense was inadvertence, oversight, mistake, and subsequent reimbursement.

But the two counts based on the automobile expenditures for one out of the more than a dozen leased automobiles raised the issue sharply and centrally; and defendant did not receive the charge to which the evidence and the law entitled him.

III. Defendant Was Not a "Person Required to File Reports" Under the LMRDA and Hence Not Subject to the Record-Keeping Requirements of Section 206 of the Act (Answering Appellee's Point III).

The Government brief relies wholly on Section 209(d) of the Act (Code Section 439(d)) as the vehicle for transforming an individual union officer into a "person required to file reports." Neither in its own language nor in the context of Title II as a whole does that Section have the effect which the Government would ascribe to it.

Section 209(d) provides only that individuals required to sign reports under Sections 201 and 203 shall be personally responsible for the filing of such reports and for knowingly false statements therein. It does not say that such individuals shall also be responsible for the maintenance or retention of records under Section 206, although Congress could readily have so provided if that were its intent.

The Government brief wholly ignores Section 207 of the Act (Code Section 437) which, as we noted in our principal brief, enumerates the sections under which a "person [is] required to file a report" -- the precise language of Section 206 -- and contains no mention of Section 209. Moreover, the record-keeping requirements of Section 206 itself are more rationally read as applicable to the single entity on which the obligation to file is placed under Sections 201, 202, 203 and 211, rather than the multiple officers who are obligated to sign such reports.

The Government's contention that this would create anomolies and unfairness has no merit. There is nothing anomolous in having the individual officers responsible for the filing

of reports, but the labor organization or the employer itself responsible for the maintenance of the records of the reporting entity. Indeed, under Section 211 of the LMRDA surety companies issuing bonds under the Act are required to file an annual report, signed by their president and treasurer; but inasmuch as Section 211 is not mentioned in Section 209(d), even the Government would have to concede that the record-keeping requirement rests only on the surety company itself, not the individual signatories of its reports.

Moreover, there are a myriad of federal statutes imposing duties upon business entities, which as a practical matter are performed by their officers and employees. If the breach of the duty has criminal consequences, then the individual officer or employee may be criminally liable, not because the statutory duty has been placed upon him, but because of the proof as to his own participation or role in the transgression, based on the facts of the particular case.

For the same reason, and contrary to the Government's contentions, there is nothing unfair or unusual in the fact that where an employer is an individual proprietor, the individual who has the status of employer is subject to the record-keeping requirement, while in the case of corporate employers, only the corporation is subject to that requirement. Precisely the same situation obtains under a vast number of regulatory statutes applicable to "employers" or "persons" -- who may be individual or corporate -- occupying a particular legal status. This, indeed, is one of the historic reasons why businessmen chose to incorporate. But use of the corporate form has never immunized corporate officers from either criminal or civil consequences

when they are responsible for the corporation's breach of a duty imposed upon it by law. Had the case been presented to the jury on this theory and had the proper instructions along this line been given, it would not have mattered that defendant himself was not subject to Section 206. But even the Government concedes, in effect, that this was not done.

IV. The Trial Court's Charge on Willfulness Under the Record-Keeping Count Was Erroneous and Misleading (Answering Appellee's Point IV).

A.

We have no dispute with the well-settled proposition that the term "Willful is a word of many meanings, its construction often being influenced by its context", Spies v. United States, 311 U.S. 492, 497 (1943); see United States v. Murdock, 290 U.S. 389, 394-395 (1933). Our point is that the trial court selected the wrong definition in his charge to the jury. In light of the striking similarity between the record-keeping section of the LMRDA and the statute involved in Murdock, the description of "willfulness" which the Supreme Court there held appropriate (and not the Court's references to other possible meanings in other statutory contexts) should have been adopted. The court below deliberately rejected the Murdock definition of willfulness for this count alone. In that, we urge, the trial judge committed error.

The only case cited in Point IV of the Government's brief which involved a statute at all similar to that in Murdock is United States v. Douglass, 476 F.2d 460 (5th Cir. 1973). But Douglass, as the Fifth Circuit opinion emphasizes, admitted that

he was fully aware of the statutory obligation to pay taxes and knowingly, intentionally and deliberately refused to do so. Since the principal issue herein was whether Ottley was aware of the record-keeping requirement and of the insufficiency (if that be so) of the kinds of vouchers he was submitting, Douglass has no applicability to this case.

B.

The recent cases from this Court, cited at page 27 of the Government brief, point up the error in the trial judge's definition of "reckless disregard", assuming arguendo that this constituted an appropriate standard.

In United States v. Joly, 493 F.2d 672 (2d Cir. 1974), this Court approved a charge that "one may not willfully and intentionally remain ignorant of a fact" and that the jury may convict if the defendant "deliberately and consciously tried to avoid learning" that fact. In United States v. Olivares-Vega, 495 F.2d 827 (2d Cir. 1974), the Court sustained a very similar charge, terming it a "conscious avoidance" charge.

In the instant case the trial court in effect charged that Ottley could be found guilty if he failed to make "reasonable efforts to know his fiduciary obligations as a union officer"; and the Government brief defends this formulation as correct. The difference between what the court below charged and the kind of "conscious avoidance" charge approved in Joly and Olivares-Vega, as well as in the cases cited in our principal brief, is both substantial and significant.

The Government brief also indulges in an interesting editing of the words of the charge. At p. 29, it argues that

failure to "make an effort to learn his fiduciary duties ... amount[s] to a conscious purpose to avoid the truth." Although we disagree with this contention and deem it absolutely inconsistent with the decisions of this Court, it is noteworthy that the charge actually given did not speak of "an effort" but of "reasonable efforts."

The two phrases have quite different meanings. The word "reasonable" has significance, not only to judges and lawyers, but to laymen as well. And it is not "frivolous," as the Government brief charges, to contend that "reasonable" in this context means simply the absence of negligence. Nor is it "absurd on its face" to urge that as a key part of a relatively short charge on the critical element to be decided by the jury, this formulation is misleading, internally inconsistent, and prejudicially erroneous.

V. The Trial Court Committed Prejudicial Error in Its Evidentiary Rulings (Answering Appellee's Point VI).

With regard to the documents disseminated by the International and the lectures by union attorneys, the Government contends that "there can be no real dispute that these matters were relevant." But they could be relevant only if they dealt with the statutory provisions at issue in this case, and they did not. The union commentaries in evidence concerned other portions of the Act; and there is no evidence as to what parts of the Act were discussed in the attorney's lectures. The Government brief makes no serious attempt to show the contrary.

But, says the Government (Gov't Br. p. 34, ftnote) if these materials were irrelevant, then defendant was not prejudiced.

This argument might have had more force had not the Government relied so heavily upon these very items of evidence in seeking to sustain the sufficiency of the evidence on the record-keeping count (Gov't Br., p. 13). The Government cannot, on the one hand, argue that this evidence represents a crucial link in the chain establishing defendant's guilty knowledge and, on the other hand, urge that the very same evidence, if erroneously admitted, did not prejudice the defendant.[6]

On the second disputed ruling on admissibility -- the exclusion of evidence as to the IRS acceptance of the sufficiency of Ottley's expense reimbursement vouchers -- the Government brief simply misstates the record.

The Court did not exclude this evidence because Ottley could not identify the agent with whom he spoke, and there was no occasion for any proffer of evidence from defendant on that score. When objection was first interposed to defendant's preliminary testimony on this event, the Court did raise the question of whether Ottley could name the agent. But before counsel could inquire of defendant, the colloquy continued, without interruption, and within a few moments the Court conclusively and definitively ruled out this entire line of testimony on other grounds. In light of that ruling, it would have been pointless and inappropriate for the defense at some later stage to have offered the name of the agent or the date or the event,

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6. The Government brief argues for "a rather low test of relevancy" in defending the admission of the union literature and testimony of attorney's lectures (p. 34, first footnote). For undisclosed reasons, it apparently would not apply this test to the exculpatory evidence which the court below excluded.

since the Court's ruling was unrelated to either identity or date.

Nor is there merit in the claim that the gist of the testimony was conveyed to the jury. Before the Court's ruling, Ottley testified only that he explained his reimbursed expenses to the IRS and submitted a memorandum. He was not permitted to testify that the IRS accepted this explanation and also accepted the sufficiency of the records he kept. Nor, as the Government concedes, was he allowed to testify as to the effect of this incident upon his own state of mind. And the judge's ruling as to the irrelevancy of this entire line of questioning prevented defense counsel from arguing any of these points in summation.

VI. Defendant Did Not Violate the Record-Keeping Requirement, Even If He Were Subject to Its Terms (Answering Appellee's Point V).

The Government complains that we have ignored the term "receipt" in Section 206 of the Act and that Ottley never submitted any receipts which he may have received for his out-of-pocket expenditures. But the statute does not speak of "receipts" received by individual officers as distinct from "receipts" received by the union itself for its own payments and expenditures. A voucher is a form of "receipt," as the dictionary definitions set forth at page 51 of our principal brief demonstrate; and through the weekly submission of petty cash vouchers, Ottley supplied, and the union retained, receipts for the weekly payment of reimbursed expenses out of the union treasury to Ottley. Given the ambiguous draftsmanship of this Section, criminal penalties cannot be imposed for failure to go beyond this.

We fail to understand the Government's contention (p. 31) that under the construction of Section 206 which we urge, the statute could have no prospective operation. Both before and after 1959, all labor organizations had books and records. To comply with the filing requirements of Section 201 of the LMRDA, such books and records became a practical necessity. The duty to preserve and retain records imposed by Section 206 upon labor organizations has very real on-going and prospective effects. And the further requirement that the union "keep ... available" these records means that they must not only be retained but kept in such place that they are physically available for inspection by appropriate authorities.

CONCLUSION

For all the foregoing reasons, and for those set forth in our principal brief, we respectfully urge that the judgment of conviction herein be reversed.

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